In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-476

MICHAEL JAMES BALDIVID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of selling over $5,000 worth of stolen property, in violation of 18 U.S.C. 2315. He was sentenced to three years' imprisonment. With one judge dissenting, the court of appeals affirmed on August 21, 1972 (Pet. App. A). The petition for a writ of certiorari was not filed until September 21, 1972, and is out of time under Rule 22(2) of this Court's Rules. There is, in any event, no reason to grant the writ.

The evidence is fully detailed in the majority opinion

below (Pet. App. A 1a-4a). Insofar as pertinent here, it showed the following: The principal witness for the government, Franklin Swann, testified that on July 26, 1970, he stole 1150 cases of whiskey, which petitioner thereafter directed him to transport from Winston-Salem, North Carolina, to Pennsauken, New Jersey, near Philadelphia (Tr. 53-54, 58-59). Swann also testified that, after the liquor had been moved, petitioner joined him there and told him that "Roy and John" wanted to buy the load on credit but that he was afraid the Mafia would attempt to steal the load if it remained in the area (Tr. 65-68). Swann stated that petitioner then ordered him to move the load and that he consequently drove the truck to Maryland, where on August 1, 1970, petitioner joined him and ultimately sold the whiskey (Tr. 66-79).

The trial court allowed Swann to testify that in 1969 he had gone to Pennsauken at petitioner's direction with a load of stolen furniture, which petitioner sold to "Roy and John" (Tr. 88-90, 174-176). Upon defendant's objection, the court admonished the jury that it should not consider the evidence to show that the defendant was of criminal character, but only to show the intent or guilty knowledge of the defendant (Tr. 89-90).

Petitioner took the stand and admitted that he had been in Philadelphia on July 30-31, 1970, but explained that he had been there on legitimate business (Tr. 293, 302, 304). He denied any knowledge of the load of stolen whiskey and any role in the sale of stolen merchandise (Tr. 343-344); and on cross-examination he denied that he had any connection with the Mafia or

had ever talked to anyone about such a connection (Tr. 350-351). In rebuttal, Allen Christenbury was allowed to testify for the government, over objection, that in 1967 petitioner had offered to finance his company, adding that he should not care whether the money came from a bank or the Mafia (Tr. 522-523). Christenbury also related that on another occasion, when it appeared he might be unable to pay petitioner a bill, petitioner alluded to the Mafia, told him that his house could burn down, and showed him several newspaper clippings about a murder in Pennsylvania, adding: "This is the way we do our business. This is the way we collect our bills" (Tr. 526-527). Petitioner allegedly also told Christenbury that his family could be harmed because "* * * when you're part of the family, this is the way it is" (Tr. 527).

Petitioner contends that the trial court abused its discretion by admitting evidence of other crimes, because such evidence was not critical to the establishment of an element of the crime of which he was accused.[1]

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[1] Petitioner also appears to adopt the portion of the dissent which, abandoning the relevancy doctrine for a doctrine of necessity, states that, although evidence of prior crimes is admissible if it establishes intent by clarifying otherwise ambiguous activity, evidence of other crimes may not be introduced to establish intent where intent is not specifically disputed or is merely a technical element of the crime. Accordingly, despite petitioner's plea of not guilty, the dissent concludes that since petitioner denied any connection with the stolen goods, thereby raising no specific claims of innocent intent, and since the circumstances of the sale, if believed, would show that the acts were performed with criminal intent and guilty knowledge, petitioner's intent or guilty knowledge was not in dispute and therefore the introduction of evidence of prior crimes served no purpose except to establish a criminal tendency (See Pet. App. A 17a-21a). Since the government bears the burden of proof

This Court has held that evidence of other criminal acts is admissible so long as the evidence is substantially relevant for some purpose other than to show that the accused committed the crime in question because he is a man of criminal character. *See Jones v. United States*, 362 U.S. 64; *Nye & Nissen v. United States*, 336 U.S. 613. Relevancy is established if the evidence of other crimes tends either to prove an element of the crime charged or to corroborate or support admitted direct evidence. *See Nye & Nissen v. United States*, supra; *Jones v. United States*, 105 F. 2d 699 (C.A. 4); *Schmidt v. United States*, 133 F. 2d 715 (C.A. 9).

Petitioner's guilty knowledge that the goods were stolen, an essential element of the crime, was not patently inferable from the acts he allegedly committed. Brown's testimony that he had previously sold stolen goods to Pennsimbene for petitioner for sale to "Ray and John" tended to show petitioner's "handiwork" or "signature" and revealed petitioner's intent and his knowledge that the goods involved in this case were stolen (Tr. App. A16b-21a).[1] Christenberry's testimony about petitioner's threats to Lisa, which indicated petitioner had likely connections in the

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[1] ... [illegible] ... a reasonable doubt as every element of the offense charged, ... against the introduction of a rule that would exclude otherwise probative evidence simply because a reviewing court might say it was not "necessary" to the proving of affirmative contravention of that element by the defendant.

"In addition, it is not apparent how Brown's testimony could really have prejudiced petitioner. The government's case turned on Brown's credibility, if the jury was not disposed to believe his other testimony, it is difficult to see how the uncorroborated testimony about a prior sale of stolen goods could have induced its confidence.

Philadelphia area, clarified petitioner's intention in sending the whiskey to that area and tended to prove he knew he was dealing in stolen merchandise (Pet. App. A 10a). It also rebutted petitioner's testimony, including his denial that he had ever told Swann he could sell whiskey "up north" (*ibid.*). In these circumstances, the court of appeals properly determined that the admission of the evidence was justified by its direct relation to the proof of the elements of the alleged offense.

This is a close case. On balance, however, we believe that the trial court did not abuse its discretion by the admission of this relevant evidence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

* U.S. Government Printing Office: 1973—497-752/288